IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 27, 2007

STATE OF TENNESSEE v. STEPHANIE E. BANEY

Direct Appeal from the Criminal Court for Bradley County
No. 05-174, 05-272 Carroll Ross, Judge

No. E2006-00867-CCA-R3-CD - Filed June 4, 2007

The defendant, Stephanie E. Baney, pled guilty to especially aggravated stalking, two counts of aggravated assault, reckless endangerment, and vandalism over $1,000, stemming from two separate indictments, and was sentenced to an effective eight-year term. On appeal, she argues that the trial court erred in imposing consecutive sentences. After our review of the record and the parties' briefs, we affirm the trial court's sentencing decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Richard Hughes, District Public Defender, Cleveland, Tennessee, for the appellant, Stephanie E. Baney.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Jerry N. Estes, District Attorney General; and John Williams, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

In April 2005, in case number M-05-174, the defendant was indicted for the especially aggravated stalking of Kay Horner, a Class C felony. In June 2005, in case number M-05-272, the defendant was indicted for reckless endangerment with a deadly weapon, a Class E felony; vandalism over $1,000, a Class D felony; and two counts of aggravated assault, a Class C felony, all against Kay Horner and her husband Perry Horner. While not entirely clear from the record, it appears that the defendant went to trial on case number M-05-174, the jury could not reach a verdict, and a mistrial was declared. The defendant bonded out of jail, but her bond was soon after revoked

for failure to appear. The defendant subsequently pled guilty to all the charges in both indictments.

A sentencing hearing was conducted on April 11, 2006. At the hearing, Kay Horner testified that she is employed by the International Offices for the Church of God of Prophecy. Mrs. Horner said that she often thinks about the number of times the defendant chased her and her family and tried to hit them with her car. Mrs. Horner said that she had to have her phone disconnected because of the numerous calls from the defendant. She said that she would not feel comfortable if the defendant were released into the community because the defendant admittedly did not see anything wrong with her actions.

Mrs. Horner recalled a particular incident when she went home early from work because her and her husband were going out of town. When she arrived home, Mr. Horner looked outside and noticed the defendant driving into their neighborhood. They loaded the car and started to back down the driveway, but the defendant pulled behind them and blocked them from getting out. Mrs. Horner recalled that Mr. Horner got out of the car and asked the defendant to move, which she did a little, but Mr. Horner went ahead and pulled through the yard and drove the opposite direction. Mrs. Horner explained that they lived on a circle road and when they "topped the hill," the defendant was driving head-on toward them. Mr. Horner pulled out of the way, but the defendant still hit the front right fender of the car. After the impact, Mr. Horner got out of the car and went to remove the defendant's keys from the ignition. When he reached in, the defendant kicked, bit, and scratched him, and tried to burn him with a cigarette lighter. The defendant then got out of her car and picked up a dead branch, which she tried to throw at Mr. Horner.

On cross-examination, Mrs. Horner acknowledged that after the defendant made bond, she sent the Horners a greeting card which caused her bond to be revoked. Mrs. Horner recalled that the defendant called her approximately thirty times while she was released on bond. Mrs. Horner also acknowledged that the defendant's calls were not direct threats as such, but she would sometimes say things like, "Go to hell."

Perry Horner testified that he feared for his wife because he did not know what the defendant was capable of doing. He stated that all these events with the defendant started because they did not respond to the defendant's requests in the way she wanted. On cross-examination, Mr. Horner testified that his wife counseled the defendant through the church, and they gave her money because they felt sorry for her and wanted to help. Several months after they began helping the defendant, a disagreement arose about the defendant's behavior, and the defendant was asked not to return to the church. Mr. Horner said that they did not know that the defendant was emotionally unstable when they began helping her.

The defendant testified that she is a divorced, thirty-one-year-old, mother of two children. The defendant recalled that she was referred to the Horners' church, Peerless Road Church of God of Prophecy, by the pastor of a church in Georgia. The defendant was seeking a place to live, a job, or some money, and the Horners' church helped her. The defendant admitted that concerns arose about her behavior at the church, and she was asked to enter into a "behavioral contract" as to how

she would act. The defendant said that she signed the contract but ripped it up two days later. She then got a call from Mrs. Horner telling her that the pastor said that she needed to leave the church. The defendant admitted that it was at this point when her relationship with the Horners deteriorated.

The defendant stated that all of her prior convictions involved the Horners. The defendant acknowledged that at one point she served 120 days in jail and then after she got out, she went to Mrs. Horner's place of employment which resulted in a stalking charge. The defendant noted that she got upset at Mrs. Horner because she got involved in the defendant's custody dispute. The defendant said that she posted bond after the mistrial, and she sent Mrs. Horner a card even though she was not supposed to have contact with the Horners. She stated that she was hoping to make amends. The defendant admitted that she has a personality disorder.

The defendant said that she was angry when she rammed her car into the Horners because she had just left the detective's office and was told she would probably never see her children again. The defendant stated that she decided not to try and contact the Horners anymore because she was tired of being put in jail. On cross-examination, the defendant admitted that there were times she was arrested that did not involve the Horners, but she explained that she was "defending [her]self." The defendant also admitted that she was on probation for stalking Mrs. Horner when she rammed her car into the Horners.

At the conclusion of the testimony, the trial court sentenced the defendant to five years for each aggravated assault, three years for vandalism, and three years for stalking.[1] The reckless endangerment conviction was merged into one of the aggravated assault convictions. The trial court ran the sentences for aggravated assault and vandalism concurrently for an effective five-year sentence, but ordered that it be served consecutively to the three-year sentence for stalking.

ANALYSIS

On appeal, the defendant challenges the trial court's imposition of consecutive sentences. This court's review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial

[1] The trial court enhanced the defendant's sentences based on her previous history of criminal convictions and criminal behavior, her previous history of unwillingness to comply with the conditions of a sentence involving release into the community, and that the felony was committed while the defendant was on probation for other charges involving the same victims. *See* Tenn. Code Ann. § 40-35-114(1), (8), and (13). The defendant does not challenge the enhancement of her sentences on appeal.

court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

When a defendant is convicted of more than one criminal offense, the trial court may order the sentences to run concurrently or consecutively as guided by Tennessee Code Annotated section 40-35-115. Pursuant to this code section, a trial court may order consecutive sentencing if any of the following criteria are found by a preponderance of the evidence:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Id. § 40-35-115(b). If the trial court finds that the defendant is a "dangerous offender," it must also determine whether consecutive sentences are reasonably related to the severity of the offenses and serve to protect the public from further criminal conduct by the offender. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995).

In ordering consecutive sentences, the trial court stated as follows:

> In determining whether to run those [sentences] consecutive or concurrently, I . . . consider the provisions of TCA section 40-35-115, paragraph (b) . . . . I do find that subsection (4) is applicable in that she has consistently harassed these people and bothered them and deliberately tried to drive over them after being ordered by various courts on various occasions to stay away from them. She was under a misdemeanor probation and restriction to stay, to have no contact with them at the time she tried to run over them. And again, there could easily have been a far more serious charge here than an aggravated assault, so I do find that that [sic] paragraph is applicable. I find that paragraph (6) is applicable, in that, "The defendant is sentenced for an offense committed while on probation." And again, I place emphasis upon that because she was on probation to stay away from these very same victims. . . .

The defendant argues that her conduct in the commission of the aggravated assaults does not support a finding that she is a dangerous offender because her striking the Horners' vehicle did not cause any bodily injury to the parties, and the use of the vehicle as a deadly weapon was the basis of her convictions. As noted above, in order to impose consecutive sentences under the dangerous offender provision, the trial court must determine that the defendant's behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; and that consecutive sentences reasonably relate to the severity of the offenses and serve to protect the public from further criminal conduct by the offender. *See Wilkerson*, 905 S.W.2d at 939.

Here, the trial court found that the defendant consistently harassed the Horners and deliberately tried to run them over "after being ordered by various courts on various occasions to stay away from them." The court noted that the defendant's conduct could have easily resulted in a more serious charge than aggravated assault. We note that these findings do not fall within the exact parameters of *Wilkerson*; nonetheless, the fact the defendant committed the offenses while on probation, as addressed below, is a sufficient basis to sentence her consecutively. *See* Tenn. Code Ann. § 40-35-115(6).

It is undisputed that the defendant was on probation when she committed these offenses. Therefore, the defendant argues in this regard that the trial court had to also find that an extended sentence was necessary to protect the public and reasonably related to the severity of the offense, *i.e.*, "the *Wilkerson* factors"; and that the aggregate sentence imposed was excessive.

We note that the defendant's assertion that the trial court had to make the *Wilkerson* findings is erroneous because the additional *Wilkerson* findings are only necessary when sentencing consecutively under the dangerous offender provision. Moreover, the defendant's claim that consecutive sentences were excessive is without merit. The court noted that the defendant had, on more than one occasion, been "told not to do the things that she then went out and did." The court pointed out that the defendant has a consistent pattern of bothering the Horners the minute she gets out of jail, even to the point of trying to physically harm them. The defendant's pre-sentence report

indicates that she has violated probation on at least three occasions and has seven convictions due to her various actions against the victims. Exhibits from the sentencing hearing illustrate that the defendant called the victims approximately twenty times and sent four pieces of mail while she was incarcerated. Upon review, we conclude that the trial court's reasoning is sound and congruent with the principles of sentencing. Therefore, the trial court did not abuse its discretion in ordering that the defendant's sentences be served consecutively.

CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the sentencing decision of the Bradley County Criminal Court.

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J.C. McLIN, JUDGE